Supreme Court, U.S.
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No. 01-1711

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. ANTHONY J. DUNLEAVY,

Petitioner,

v.

THE COUNTY OF DELAWARE, MARIANNE GRACE, EXECUTIVE DIRECTOR; THE COUNCIL OF THE COUNTY OF DELAWARE, WALLACE H. NUNN, CHAIR; MATTHEW HAYES, JR., ADMINISTRATOR FOR THE ESTATE OF MATTHEW J. HAYES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Third Circuit correctly apply well-established principles set forth by this Court in holding that counties and other local governmental entities are not liable in suits brought by relators under the False Claims Act because of the longstanding presumption that local governmental entities are immune from punitive damages except where Congress has clearly expressed its intention to abrogate that immunity?

II. Did the Third Circuit correctly affirm the District Court's dismissal of Matthew J. Hayes as an individual defendant where the District Court found that there was nothing in Plaintiff's Second Amended Complaint to suggest that Hayes was sued in anything other than his official capacity?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

A. Proceedings Below 2

ARGUMENT — REASONS FOR DENYING THE WRIT 3

I. Although There Is A "Split" In The Circuits, The Decision Below Is In Accordance With The Trend Of Decisions, And The Lone Contrary Circuit Decision Is An Aberration 3

II. The Decision Below Does Not Threaten The Government's Ability To Protect The Treasury 6

III. Review Would Be Premature Here Since Cases Are Pending Before Two Circuits Which Will Allow The Court Of Appeals To Further Define The Issue 7

IV. The Third Circuit's Decision Was Correct . . . 8

A. This Court has held that the mandatory treble damages imposed by the False Claims Act are punitive and that there is a longstanding presumption against holding municipalities liable for such damages 8

B. The Third Circuit correctly applied the holdings of *Stevens* and *City of Newport* in resolving the issues presented in this case 12

TABLE OF CONTENTS

Page

V. The Third Circuit's Affirmance Of The District Court's Decision That Hayes Was Not Individually Liable Under The False Claims Act Was Proper And Is In Accordance With Other Decisions. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: ***Page***

Alexander v. Gilmore, 2002 WL 970650 (E.D. Va. Apr. 30, 2002) 16

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 15

Bly Magee v. State of California, 236 F.3d 1014 (9th Cir. 2001) 16

City of Newport v. Fact Concerts, 453 U.S. 247 (1981) . . . . . *passim*

Cowles v. Mercer County, 7 Wall 118, 121, 19 L.Ed.86 (1869) 14

Hafer v. Melo, 502 U.S. 21 (1991) 16

Louisville Railway Co. v. Letson, 2 How. 498, 558, 11 L.Ed 353 (1844) 14

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 14

Rowland v. California Men's Colony Unit II Men's Advisory Council, 506 U.S. 194 (1993) 4

Texas Industries v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 9

Tull v. United States, 481 U.S. 412 (1987). 12

United States ex rel. Chandler v. Cook County, 28 F.3d 969 (7th Cir. 2002). 3, 4

United States ex rel. Chandler v. Cook County, 118 F.Supp. 2d 902 (N.D. Ill. 2000), *reversed*, 28 F.3d 969 (7th Cir. 2001). 5, 8

United States ex rel. Dunleavy v. The County of Delaware, et al., 279 F.3d 219 (3d. Cir. 2002), *rehearing denied*, (Feb. 22, 2002) . . . . . *passim*

TABLE OF AUTHORITIES

Cases: ***Page***

United States ex rel. Garibaldi v. Orleans Parish School Board, 244 F.3d 486 (5th Cir. 2001), *cert. denied,* 122 S. Ct. 808, *rehearing denied,* 122 S. Ct. 1198 (2002) 4, 8

United States ex rel. Giles v. Sardie, 2000 U.S. Dist. LEXIS 2021068 (C.D.Cal July 27, 2000) 5

United States ex rel. Gaudineer & Comito, L.L.P. v. State of Iowa, 269 F.3d 932 (8th Cir. 2001). 16

United States ex rel. Graber v. City of New York, 8 F.Supp. 2d 343 (S.D.N.Y. 1998) 5, 8

United States ex rel. Honeywell v. San Francisco Housing Authority, 2001 WL 793300 (N.D. Cal. July 12, 2001) 5, 16

United States ex rel. K & R Ltd. Partnership v. Massachusetts Housing Finance Agency, 154 F.Supp.2d 19 (D.D.C. 2001), *appeal pending,* No. 02-5043 (D.C. Cir.) 5, 7

United States ex rel. King v. Jackson County Hospital Corp., 2001 U.S.Dist. LEXIS 21706 (N.D.Fla. Aug.17, 2001), *appeal pending,* No. 02-11471-A (11th Cir.) 5, 7

United States ex rel. Kinney v. Hennepin County Medical Center, 2001 WL 930780 (D.MN Jan. 22, 2001) 5

United States ex rel. Kinny v. Stoltz, 2002 WL 523869, No. Civ. 01-1287 (D. Minn. Apr. 5, 2002) 16

United States ex rel. Rosales v. San Francisco Housing Auth., 173 F.Supp.2d 987 (N.D.Cal.2001) 5

United States ex rel. Satalich v. City of Los Angeles, 160 F.Supp 2d 1092 (C.D.Cal. August 31, 2001) 5

TABLE OF AUTHORITIES

Cases: ***Page***

United States ex rel. Wilson v. Graham County Soil and Water Conservation District, 2002 WL 487162 (W.D. N.C. March 25, 2002) 5, 16

United States v. Bornstein, 423 U.S. 303 (1976). 8, 10

United States v. Hickman County, No. 1:97-0086 (M.D. Tenn. March 29, 2001) 5

United States v. Mackby, 21 F.3d 821, 830-31 (9th Cir. 2001) 5

United States v. McNinch, 356 U.S. 595 (958) 10

United States Department of Energy v. Ohio, 503 U.S. 607 (1992) 12

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) . . . . . *passim*

Statutes and Other Authorities:

15 U.S.C. §1691(f). 13

15 U.S.C. §3301(26) 13

15 U.S.C. §3002(i). 13

16 U.S.C. §4903(4) 13

31 U.S.C. §3729(a) 1

31 U.S.C. §3730(d)(2) 10

31 U.S.C. §3733 . . . . . 9, 13

31 U.S.C. §3801 9

33 U.S.C. §1362(5) 13

33 U.S.C. §1901(a) 13

33 U.S.C. §2001(i). 13

33 U.S.C. §2701(27) 13

TABLE OF AUTHORITIES

Statutes and Other Authorities: *Page*

42 U.S.C. §300f (12) 13

42 U.S.C. §2000e(a) 13

42 U.S.C. §2014(5) 13

42 U.S.C. §6903(15) 13

42 U.S.C. §7602(e) 13

50 U.S.C. §167(2) 13

24 C.F.R. 85.1 6

24 C.F.R. 85.42 6

24 C.F.R. 570.900-906 6

24 C.F.R. 570.910-913 6

Legislative History:

Cong. Globe, 37th Cong., 3d Sess. 952 (1863) 10, 11

132 Cong. Rec. 22335, 22336, 22337 (1986) 11, 12

False Claims Reform Act: Hearings on S. 1562 11

Treatises and Articles:

Michael L. Colis, *Settling for Less: The Department of Justice's Command Performance under the 1986 False Claims Amendments Act*, 7 Admin L.J. Am.U. 409 (Summer 1993) 11

Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L. J. 1795, 1955, 1861 (June 1992) 10, 11

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 7, 8

Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982) 8

COUNTERSTATEMENT OF THE CASE

Despite Petitioner's attempts to exaggerate the importance of this case, the proceedings below merely represent the well-reasoned application by the Court of Appeals for the Third Circuit of long-established precedent of this Court to a rather unique set of facts. Following the holdings of this Court in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Court of Appeals concluded that Delaware County, Pennsylvania ("the County") could not be liable in a suit brought by a relator under the False Claims Act because Congress did not manifest an intent to overcome the common law immunity of municipalities from punitive damages. Additionally, the Third Circuit affirmed the District Court's decision that Matthew J. Hayes, deceased former Executive Director of the County, could not be liable because the Plaintiff's Complaint failed to set forth any claim against him in his individual capacity.

Petitioner seriously misstates the rationale of the Third Circuit's decision in framing the Question Presented as whether a municipal corporation is included within the definition of the term "person" under the False Claims Act, 31 U.S.C. §3729 (a). In concluding that the False Claims Act is not applicable to the County, the Third Circuit did not base its holding on the definition (or the absence of a definition) of "person"; rather it concluded that the punitive nature of the False Claims Act could not be squared with the common law immunity that protects local governments from punitive damages:

> [T]he mandatory treble damages scheme imposed by the FCA is punitive and that local governments are exempt from FCA damages because congress did not clearly express its intention under the Act to abrogate local governmental common law immunity against punitive damages. (A-16)[1]

Petitioner correctly notes that the facts generally were not determinative of the Third Circuit's holding and are not germane to this Petition. However, Petitioner's statement of facts, in many instances, does not accurately reflect the record below. Given the marginal relevance of these errors, Respondent will dispense with exhaustively cataloging the errors of fact in the Petition's Statement of the Case.[2]

A. Proceedings Below.

Petitioner ignores one crucial aspect of the proceedings below. With regard to the claims against Mr. Hayes, the District Court found that the Complaint failed to state a claim against Mr. Hayes in his individual capacity because there was no substantive allegation that he acted outside his official capacity.

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1. Citations to the Petition for Certiorari are designated as "(Pet. -__)"; citations to the Appendix attached to the Petition for Certiorari are designated as "(A-___)".

2. By way of example only, at Pet.-3, n.2, Petitioner refers to an "uncontroverted expert report" stating that the County should have retained (for subsequent repayment to the Government) over $5,000,000 but only retained approximately $2,000,000. This statement inexplicably ignores the fact that Delaware County submitted an expert report demonstrating that the County repaid the Government within $315.00 of the appropriate amount. Additionally, Petitioner ignores the voluminous evidence of record that the County, in its actions concerning the Penza Tract fund, acted in accordance with and under the guidance of his professional advice. Furthermore, Petitioner takes serious liberty with his descriptions and characterizations of the actions of Mr. Hayes, which are not supported by evidence in the record.

ARGUMENT
REASONS FOR DENYING THE WRIT

I. Although There Is A "Split" In The Circuits, The Decision Below Is In Accordance With The Trend of Decisions, And The Lone Contrary Circuit Decision Is An Aberration.

In an attempt to induce review, Petitioner exaggerates the significance of the "split of authority." Although the Act was passed 139 years ago, only three of the twelve circuits squarely have addressed the Act's application to local governmental entities, all within the last fifteen months. To the extent a "split" exists, it is less than six months old. Two circuits (the Third and the Fifth) have held that because the False Claims Act is punitive in nature and because Congress did not manifest an intent to abrogate municipalities' common law immunity to punitive damages, municipalities are immune from liability in suits brought by relators under the False Claims Act.

Petitioner asserts that the Third Circuit ruling in this case perpetuates a sharp conflict with the Seventh Circuit's ruling in *United States ex rel. Chandler v. Cook County*, 28 F. 3d 969 (7th Cir. 2002). Below the level of the result, that is not the case. *Chandler* held that municipalities were "persons" under the False Claims Act. The Third Circuit's rationale did not turn on the issue of whether the term "person" includes municipalities. Rather, the Third Circuit based its decision in this case on this Court's holding in *Stevens* that the damages imposed under the Act are punitive in nature, coupled with the holding of *Newport* that a municipality's common law presumption of immunity shielded a municipality from the imposition of punitive damages unless Congress clearly manifested its intent to abrogate that immunity. While *Chandler* focused on the definition of "person", the Third Circuit based its rationale on the inconsistency of a punitive statute that would impose treble damages on a municipal entity without a clear indication from Congress that that is what it intended.

The Seventh Circuit is the only Court of Appeals addressing this issue to have overlooked the importance of the punitive nature of the False Claims Act and to conclude that local governmental entities are "persons" under the False Claims Act. The first circuit court decision to address this issue was *United States ex rel. Garibaldi v. Orleans Parish School Board,* 244 F. 3d 486 (5th Cir. 2001), *cert. denied,* 122 S. Ct. 808, *rehearing denied,* 122 S. Ct. 1198 (2002)[3] in which the Fifth Circuit held that a school board, as a local government unit, is not subject to False Claims Act liability in suits by relators. The Fifth Circuit held that municipalities are not "persons" under the False Claims Act because there was no clear indication that Congress intended to impose the False Claim Act's punitive sanctions upon local governmental entities. The Fifth Circuit rejected Relator's argument that the Dictionary Act requires the definition of "person" to include local governments and held that, by its own terms, the Dictionary Act's definitions do not apply when the context of a statute indicates that Congress "intends" another meaning. *Id.* at 492, *citing, Rowland v. California Men's Colony Unit II Men's Advisory Council,* 506 U.S. 194 (1993). The Fifth Circuit determined that, even if it were clear that "the definition of 'person' in the Dictionary Act included local governments, the punitive damages regime of the False Claims Act 'indicates' a congressional intent that local governments not be subject to liability under the False Claims Act." *Id* at. 492. (Emphasis added).

Similarly, although it did not directly address the question of municipal liability under the False Claims Act, the Ninth Circuit held that the Act's civil fines provision

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3. Certiorari originally was denied on January 7, 2002, before the decisions by the Third and Seventh Circuits in *Dunleavy* and *Chandler.* However, after *Chandler* was issued, the Relators in *Garibaldi* filed a petition requesting rehearing on the basis that *Chandler* created a split in the Circuits. This Court denied the Relator's Petition for rehearing on February 25, 2002, several weeks after the issuance of the decisions in *Dunleavy* and *Chandler.*

"clearly has a punitive purpose" and that the treble damage scheme likewise is at least partially punitive. *United States v. Mackby*, 261 F.3d 821, 830-31 (9th Cir. 2001) (remanding case for an excessive fines clause analysis of both the civil fines and treble damages, under the Eighth Amendment).[4] *Id.*

The small number of circuits that have addressed the applicability of the False Claims Act generally have reached the same result for the same reason — immunity — except for the one circuit, the Seventh, which recently reached a different result on a distinct rationale — the statutory interpretation of the term "person". The possibility or

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4. The majority of District Courts addressing this issue likewise have concluded that, because of the punitive nature of the False Claims Act, municipalities are not subject to suits under that statute. *See United States ex rel. Wilson v. Graham County Soil and Water Conservation District*, 2002 WL 487162 (W.D. N.C. March 25, 2002); *United States ex rel. Satalich v. City of Los Angeles*, 160 F. Supp. 2d 1092 (C.D. Cal. Aug. 31, 2001); *United States ex rel. Honeywell v. San Francisco Housing Authority* 2001 WL 793300 (N.D.Cal. July 12, 2001); *United States ex. rel. Kinney v. Hennepin County Medical Center*, 2001 WL 930780 (D. MN. Jan. 22, 2001); *United States v. Hickman County*, no. 1:97-0086 (M.D. Tenn. March 29, 2001); *United States ex. rel. King v. Jackson County Hospital Corp.*, 2001 U.S. Dist. Lexis 21706 (N.D.Fla. Aug. 17, 2001); *United States ex. rel. Graber v City of New York*, 8 F. Supp. 2d 343 (S.D.N.Y. 1998); *United States ex rel. Chandler v. Cook County*, 118 F. Supp.2d 902 (N.D. Ill. 2000), *reversed*, 28 F. 3d 969 (7th Cir. 2001).

Only a few of District Courts have disregarded the punitive nature of the Act and held municipalities liable. *See United States ex rel. Giles v. Sardie*, 2000 U.S. Dist. Lexis 2021068 (C.D.Cal. July 27, 2000); *United States ex. rel. Rosales v. San Francisco Housing Authority*, 173 F. Supp.2d 987 (N.D. Cal. 2001); *United States ex rel. K & R Ltd. Partnership v. Massachusetts Housing Finance Co.*, 154 F.Supp. 2d 19 (D.D.C. 2001).

The determination by the Ninth Circuit Court of Appeals in *Mackby*, that the False Claims Act has a punitive purpose, should resolve the dichotomy in the District Courts of the Ninth Circuit, as the Ninth Circuit will necessarily begin from the proposition that the False Claims Act is at least partially punitive. Of the four cases in the Northern and Central Districts of California, both cases holding that municipalities could be liable under the False Claims Act (the *Rosales* and *Giles* cases) were decided before *Mackby*.

likelihood remains that, in light of the unanimity of the other circuits, the Seventh Circuit in future cases would reconsider the immunity aspect and reevaluate its contrary result.

II. The Decision Below Does Not Threaten the Government's Ability to Protect the Treasury.

The alleged "conflict" in the lower courts does not threaten the Government's ability to protect the United States Treasury from frauds wrought by local governmental entities. First, it is significant that, as Petitioner acknowledges, the United States, having been provided the opportunity, declined to intervene concluding that no fraud had been committed. (Pet. - 4). Second, the Government has many other means to protect the public treasury from fraud by local governments that do not include the *in terrorem* threat of punitive damages. The most obvious of these are the audit commonly performed by the Government and include a wide array of remedies and sanctions. *See, e.g.,* 24 C.F.R. §85.42 (requiring grant recipients to provide access to the Comptroller General and HUD representatives, such as the Inspector General, to conduct audits and examinations); §§570.900-906 (requiring HUD to conduct reviews of grantee performance on an annual or more frequent basis); §§570.910-913 (governing the sanctions available to HUD to remedy grantee non-compliance).[5] Indeed, in this case, the Government performed an audit and, in response, the County did repay $1,921,699 to the Government, which payment the federal government then returned to the County for use in its Community Development Block Grant Program.

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5. Section 85.42 relates generally to "Federal grants and cooperative agreements and subawards to state, local and Indian tribal governments." 24 C.F.R. §85.1. Sections 570.900-913 relate specifically to the grantee under the Community Development Block Grant program. However, similar provisions can be found in the regulations governing many other grant programs.

In addition to audits accompanied by statutory or regulatory remedies, the Government may employ the full panoply of common law remedies, such as actions for breach of contract, and fraud, to obtain compensation for improper acts by municipalities or their officials. The False Claims Act clearly is not the only, or even the most effective, weapon in the Government's arsenal to combat potential fraud by local governments.

III. Review Would Be Premature Here Since Cases Are Pending Before Two Circuits Which Will Allow the Court of Appeals to Further Define the Issue.

Review at this time would be premature not only because the circuits have not yet arrived at a single analytical approach to the Act's applicability to local governmental entities but also because not all of the circuits have yet had the opportunity to address this issue and several cases raising this issue are pending. At least two other Courts of Appeals, the Eleventh and the District of Columbia Circuits, will soon have the opportunity to address the issue of municipal immunity from liability under the False Claims Act. *See United States ex rel. King v. Jackson County Hospital Corp.*, 2001 U.S. Dist. LEXIS 21706 (N.D. Fla. Aug. 17, 2001), *appeal pending*, No. 02-11471-A (11th Cir.); *United States ex rel. K&R Limited Partnership v. Massachusetts Housing Finance Agency*, 154 F.Supp. 2d 19 (D.D.C. 2001), *appeal pending*, No. 02-5043 (D.C. Cir). Thus, in the near future, at least two more Courts of Appeal will have the opportunity to consider the decisions of the Third, Fifth and Seventh Circuits and confirm that, since this Supreme Court already has found the False Claims Act to be punitive in nature, and because Congress failed to manifest a clear intent to pierce municipal common law immunity from punitive damages, the Third and Fifth Circuits are correct on the ground of immunity. This, therefore, is a classic case in which premature review is to be avoided. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*

(7th ed. 1993) at 171, *quoting* Justice Stevens, *Some Thoughts on Judicial Restraint,* 66 Judicature 177, 183 (1982) ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.")

Additionally, the novelty and recent emergence of this issue in the False Claims Act context weighs in favor of judicial restraint at this time. The False Claims Act initially was enacted in 1863. It was not until four years ago, in 1998, that the issue of whether a municipality was liable under the Act first was addressed by any court. *See United States ex rel. Graber, supra.* It was not until March, 2001 that any Circuit Court issued an opinion on the issue. *See United States ex rel. Garibaldi, supra. Chandler* was issued in January, 2002. The "split" — if there is one — is less than six months old.

IV. The Third Circuit's Decision Was Correct.

The Third Circuit's decision below represents the correct and well-reasoned application of this Court's prior decisions in *Stevens* and *Newport.* Thus, there is no need to grant review here.

A. This Court has held that the mandatory treble damages imposed by the False Claims Act are punitive and that there is a longstanding presumption against holding municipalities liable for such damages.

This Court in *Stevens* decided that a relator cannot bring suit against a state or state agency under the False Claims Act. Beginning with a review of the historical context of the Act, the Court acknowledged that the Act ". . . was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the civil war'" and noted that the statute's original did not even make clear that private corporations were covered, let alone States. *Stevens,* 529 U.S. at 781, *citing, United States v. Bornstein,* 423 U.S. 303, 309 (1976)

(*bracketed materials in Stevens*). This Court stated that the term "person" in the statute has remained materially unchanged since 1863; thus any analysis as to Congress' intent necessarily leads back to the 1863 Congress. *Id.*, 529 U.S. at 782 n.12.

In *Stevens*, the Court reiterated the presumption that the term "person" does not include states, which can be rebutted only by clear evidence of Congress' intent to do so. Although the same presumption does not apply to municipalities, the Court identified several other important factors supporting its conclusion that states are not subject to *qui tam* liability, which factors do apply to local governmental agencies. Most relevant to this Petition, the Court recognized the punitive nature of the Act's damages:

> [T]he current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent with state qui tam liability in light of the presumption against imposition of punitive damages on governmental entities. *See e.g., Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 262-263 (1981).

Stevens, 529 U.S. at 784-785. In support of its decision, this Court specifically relied upon the seminal case establishing that political subdivisions are immune from punitive damages. This Court went on to state that: "[t]he very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Stevens*, 529 U.S. at 786, *quoting, Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).[6]

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6. The Court held that its conclusion that states are not "persons" also was buttressed by the facts that: (a) the civil investigative demand provisions of the Act, 31 U.S.C. §3733(a)(1), specifically defines "person" to include states and political subdivisions for that limited purpose; and (b) the Program Fraud Civil Remedies Act, 31 U.S.C. §3801 *et seq.* explicitly excluded states and political subdivisions from its liability provisions. *Stevens*, generally. These same factors establish that Congress likewise did not intend to vitiate the common law immunity from punitive liability that protects municipalities.

Petitioner attempts to distinguish the False Claims Act punitive damages from those at issue in *Newport* by arguing that "under the FCA there is no diversion of public money to an individual private plaintiff in the form of damages . . ." (Pet.-17). Petitioner blatantly ignores the fact that a relator, in cases in which the Government does not intervene (such as this case), receives 25% to 30% of the total proceeds, which "shall be paid out of such proceeds." 31 U.S.C. §3730(d)(2). Thus, an amount almost equal to the Government's actual damages (before trebling) would be paid from local governments tax revenues to private persons — relators; this does not include the relator's attorneys' fees which must be paid, again, from local government funds. *Id.*

This Court's decision in *Stevens* leaves no doubt that the Act is punitive, despite Petitioner's contrived arguments. *Stevens* accurately reflects the legislative intent behind the original False Claims Act and the 1986 Amendments, as well as well-established judicial precedent. The False Claims Act was enacted in 1863 during the Civil War, to address widespread and blatant fraud by private military contractors, who had been billing the United States for nonexistent or worthless goods, charging exorbitant prices for goods, and generally plundering the public treasury. *See United States v. McNinch,* 356 U.S. 595, 599 (1958). Its purpose was not merely to compensate the federal government; rather its "stringent provisions are required for the purpose of punishing and preventing these frauds." *McNinch,* 356 U.S. at 600, *quoting Cong. Globe, 37th Cong.,* 3d Sess. 952 (1863).[7] *See also* Kenneth Mann,

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7. Petitioner cites *U.S. v. Bornstein,* 423 U.S. 303 (1976), at footnote 16 of its Petition for the proposition that the FCA was remedial rather than punitive; however, that case was decided before the Act was amended to provide for treble damages and a civil penalty of up to $10,000 per claim. Indeed, given this Legislative history and Congressional intent to punish wrongdoers, the False Claims Act, with double damages and civil penalties of $2,000.00 per violation, arguably was punitive in nature even before the 1986 Amendments, which have clearly been found by *Stevens* to be punitive. Moreover, this Court in *Bornstein* specifically

Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L. J. 1795, 1855, 1861 (June 1992)(intent of False Claims Act to punish wrongdoers). Congressman Fish, a sponsor of the 1986 amendments, acknowledged that the purpose of the unamended Act's double damages recovery, and civil fines, were intended to be a "substantial penalty" to "forcefully discourage individuals and companies . . . from engaging in fraudulent practices" and that the "dual purpose of any such law should always be to deter as well as punish fraudulent conduct." 132 Cong. Rec. 22336, 22337 (1986).

The 1986 amendments to the Act enhanced the punitive nature of the statute's remedies by establishing the current treble damages, increasing fines from $2,000 to $5,000-$10,000 per false claim and requiring defendants to pay relators' attorneys' fees. Making this change, "Congress understood very well that it was instituting new 'punitive sanctions.'" Mann, 101 YALE L.J. at 1860.

Prior to the passage of the 1986 Amendments, the Department of Justice warned Congress that treble damages and increased penalties would render the False Claims Act more likely to be considered punitive. *See* Michael L. Colis, *Settling For Less: The Department of Justice's Command Performance under the 1986 False Claims Amendments Act,* 7 Admin. L. J. Am. U. 409 (Summer 1993), *citing,* False Claims Reform Act: Hearings on S. 1562 Before the Subcommittee in Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Cong., 1st Sess. 2 (1985) (statement of Jay B. Stephens, Deputy Associate Attorney General, U.S. Department of Justice) 132 Cong. Rec. 22336, 22337 (1986). Cognizant of this warning, Congress increased penalties precisely to accommodate the perceived need to increase the Act's deterrent

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acknowledged that "[a]ccording to its sponsor, the False Claims Act was adopted "for the purpose of punishing and preventing . . . frauds." *Id.*, 423 U.S. at 309 n.5, *citing, Cong. Globe, 37th Cong. 3d Sess.*, 952 (remarks of Sen. Howard), 955 (remarks of Sen. Wilson).

effect. *See* statements of Rep. Glickman and Rep. Brooks, 132 Cong. Rec. 22335, 22336 (1986).

The civil penalties imposed by the Act likewise are punitive. *See e.g. United States Department of Energy v. Ohio,* 503 U.S. 607 (1992) (civil penalties under the Clean Water Act and the Resource Conversation and Recovery Act of 1976 were intended to be punitive); *Tull v. United States,* 481 U.S. 412, 422 n. 7 (1987) ("the remedy of civil penalties is similar to remedy of punitive damages").

B. The Third Circuit correctly applied the holdings of *Stevens* and *City of Newport* in resolving the issues presented in this case.

The Third Circuit began its own analysis in this case by citing *City of Newport* for the well-settled presumption that "[u]nless Congress clearly provides otherwise, a local governmental entity is immune from punitive damages awards". (A-7). Because *Stevens* definitively and affirmatively answered the "threshold question" of "whether the damages imposed by the Act are punitive," the Third Circuit next focused on whether Congress expressed a clear indication that it intended to abrogate local governmental immunity under the False Claims Act. (A 9-10). After careful consideration, the Third Circuit found no evidence of any congressional intent to abrogate that well settled common law immunity either in the statute itself or in the legislative history; thus, holding that Congress did not intend to disturb local governmental immunity from punitive damages by clearly including local governments within the meaning of the term "person", and that the County is immune from claims under the False Claims Act due to the mandatory nature of the treble damages provision. (A-15).

Congress is aware of this immunity and can take action, if it so chooses, to abrogate this presumption. The Third Circuit found no evidence that Congress had taken any action to authorize the imposition of these punitive damages

against municipalities under the Act. There is nothing in the statute itself that indicates that Congress intended abrogate it. Unlike numerous other statutes,[8] the liability provisions of the False Claims Act do not define the term "persons" to include counties, municipalities or other political subdivisions; indeed, it does not define the term "person" in any way. *Newport* teaches that general language within a statute does not overcome the longstanding and well-established presumption against imposing punitive sanctions upon counties and other municipal entities.

Petitioner attempts to obscure this issue by arguing that the common law immunity from punitive damages does not shield the County or other municipalities because Congress used the term "person" without definition in the statute and because, Petitioner argues, it was "thoroughly established" that Congress intended the term "person" to include municipal corporations at the time when the FCA was adopted." (Pet. - 11.) This argument fails for two reasons. First, the Civil Rights Act, like the False Claims Act, uses the term "person" without definition. Yet, this Court in *City of Newport* explicitly held that Congress did not intend to impose punitive damages upon municipalities under the Civil Rights Act. Therefore, the mere use of the

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8. *See, e.g.*, the Clean Water Act, 33 U.S.C. §1362(5)("person" defined to include ". . . State, municipality, commission or political subdivision of a State . . ."); Resource Conservation and Recovery Act, 42 U.S.C. §6903(15) (defining "person" to include ". . . corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body"). *See also* the following statutes which incorporate the terms "municipality", "government" or "political subdivision" in specific definitions of "person": 15 U.S.C. §1691(f); 15 U.S.C. §3002(i); 15 U.S.C. §3301(26); 33 U.S.C. §2001(i); 16 U.S.C. §4903(4); 42 U.S.C. §2000e(a); 42 U.S.C. §2014(5); 42 U.S.C. §7602(e); 42 U.S.C. §300f(12); 33 U.S.C. §1901(a); 33 U.S.C. §2701(27); 50 U.S.C. §167(2). The Civil Investigative Demand section of the False Claims Act itself demonstrates that, when Congress intends to include political subdivisions, it knows how to do so since, for purposes of that section of the Act only, Congress explicitly defined "person" to include political subdivisions. *See* 31 U.S.C. §3733.

term "person" in the False Claims Act likewise does not pierce municipal immunity.

Second, the scope of the term "person" was not well established at the time the False Claims Act was passed. In *Monell v. Department of Social Services,* 436 U.S. 658 (1978), this Court considered whether the members of Congress in 1871 understood the term "person" to include municipal corporations. It observed that by 1844, the Supreme Court had abandoned the principle that corporations were not persons. *Id.* at 688, *citing Louisville Railway Co. v. Letson,* 2 How. 498, 558, 11 L.Ed 353 (1844). However, it was not until 1869 when the Supreme Court extended its holding in *Letson* to municipal corporations. *Id., citing Cowles v. Mercer County,* 7 Wall 118, 121, 19 L.Ed.86 (1869). Thus, the clarification regarding municipal corporations came six years after the False Claims Act was enacted. This analysis, coupled with the fact that the Dictionary Act was not enacted until 1871, shows that the term "person" was not well settled so as to include municipalities in its definition when the False Claims Act was passed in 1863.

Thus, the Third Circuit correctly concluded that Congress did not manifest a clear intent to pierce local governmental immunity through the False Claims Act.

V. The Third Circuit's Affirmance Of The District Court's Decision That Hayes Was Not Liable Individually Under The False Claims Act Was Proper And Is In Accordance With Other Decisions.

Petitioner also challenges the Third Circuit's decision to affirm the District Court's holding that former County Executive Director Matthew J. Hayes was not liable under the False Claims Act as an individual because he did not personally benefit from the transactions constituting violations of the Act. The Third Circuit's ruling on this issue is merely a routine application to the facts and

pleadings of this case of well-established principles of pleading personal capacity.

The Third Circuit properly resolved the issue of Mr. Hayes' individual liability, and there is no need for this Court to review that issue. In the matter *sub judice,* the Third Circuit agreed with the District Court that Hayes was not liable because there was no allegation that Hayes personally benefited from any of the transactions constituting alleged violations of the Act. However, the sum and substance of the District Court's opinion was that there "was nothing in Plaintiff's Second Amended Complaint to suggest that Hayes is sued in anything other than his official capacity." (A-41) . The District Court specifically stated that "while Plaintiff avers that Hayes had detailed knowledge of many of the transactions at issue, Plaintiff does not allege that Hayes acted for his own benefit, profited at the public's expense, spent the money at issue for any non-public purpose, or acted in any capacity other than his official one." (A-41). Thus, the District Court held, Dunleavy failed to state a claim upon which relief could be granted against Hayes by failing to even allege facts that could possibly constitute an individual capacity suit against the former Executive Director. In reviewing the District Court's decision on this issue, the Third Circuit agreed and determined that no additional analysis has been necessary to support its determination to affirm the decision.

This Court has ruled that the mere incantation of the term "individual capacity" is insufficient to transform an official capacity action into an individual capacity action. *See e.g., Bender v. Williamsport Area School District,* 475 U.S. 534, 543 (1986). Courts around the country have had no

difficulty in applying this principle of pleading to suits under the False Claims Act and uniformly have adopted the same approach as the Third Circuit.[9]

Petitioner cites only *Hafer v. Melo*, 502 U.S. 21 (1991), a Civil Rights Act case, to support its argument that municipal officers in their individual capacities can be held as proper defendants. However, Petitioner has identified no valid reason why this Court should review the Third Circuit's application of well-established pleading rules to the pleadings in this case. Petitioner can point to no alleged conflict among the Circuits regarding the issue of individual capacity suits under the False Claims Act, and the Third Circuit's decision clearly was correct.

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9. *See United States ex. rel. Gaudineer & Comito, L.L.P. v. State of Iowa*, 269 F. 3d 932 1936 (8th Cir. 2001) (court "should look at whether the alleged conduct of the defendant was outside his official duties" and "not rely wholly on the elementary mechanics of captions and pleadings"); *Bly Magee v. State of California*, 236 F. 3d 1014 (9th Cir. 2001) (former attorney general and other attorneys who worked for the attorney general would be immune under False Claims Act for conduct during the performance of their official duties); *Alexander v. Gilmore*, 2002 WL 970650 (E.D.Va. Apr. 30, 2002), (dismissed because complaint did not allege that defendants there were acting in anything other than their official capacities, and nothing in complaint suggested that the individual defendants converted funds for their personal use); *United States ex rel. Honeywell v. San Francisco Housing Authority*, 2001 WL 793300 (N.D.Cal. July 12, 2001) (False Claims Act claims against governmental officials in their personal capacities must contain allegations of personal gain); *United States ex rel. Kinny v. Stoltz*, 2002 WL 523869 at *7 n. 3, No Civ. 01-1287 (D. Minn. Apr. 5, 2002) (same); *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 2002 WL 487162 at *11, No 2:01 CV 19-R 2002 (WD N.C. Mar. 25, 2002) (same).

CONCLUSION

For the foregoing reasons, Delaware County respectfully requests that the Court deny the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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